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By SHAUNA I. MARSHALL*

ON MARCH 9, 1984, black women, white women and the San Francisco Chapter of the International Association of Black Firefighters ("BFA") filed a civil rights class action complaint against the City and County of San Francisco. That action, *Davis v. City and County of San Francisco*[1] sought damages, declaratory relief and injunctive relief and alleged that the San Francisco Fire Department ("SFFD") used discriminatory procedures for the selection and promotion of firefighters.[2] Initially, two public interest law firms, Equal Rights Advocates ("ERA") and San Francisco Lawyers' Committee for Urban Affairs ("Lawyers' Committee") and one private law firm, Pearl, McNeill, Gillespie & Standish, represented the plaintiffs. The defendants, meanwhile, were represented by counsel from the City Attorney's office.

In July 1984, I joined ERA, just four months after the class action complaint had been filed against the SFFD. I was assigned immediately to the *Davis* case and began to familiarize myself with the allegations in the complaint. In regard to class action requirements under Federal Rule of Civil Procedure ("FRCP") 23, everything seemed in order. First, the complaint proposed four classes: (1) minority women who had taken or would take the Fire Department entrance exam; (2) white women who had taken or would take the Fire Department entrance exam; (3) black men who had taken or would take the Fire Department entrance exam; and, (4) black men

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1. 656 F. Supp. 276 (N.D. Cal. 1987).

2. Complaint for Damages and Declaratory and Injunctive Relief at 2, Davis v. City and County of S.F., 656 F. Supp. 276 (N.D. Cal. 1987) (No. 84-1100).

who had taken or would take Fire Department promotional exams.[3] Second, pursuant to FRCP 23, the complaint alleged the four basic requirements for a federal class action: numerosity, common questions of law and fact (commonality), typicality and adequate class representation.[4]

Having previously spent five years as a civil and criminal prosecutor for the United States Department of Justice, Antitrust Division, I had limited knowledge of class action law. Moreover, the discussions around the office about "empowering our clients so that they could carry out institutional change" was a vague concept to me. I did understand that our complaint sought injunctive relief, and that the presence of women for the first time inside the houses of the SFFD would forever change that institution. However, the use of a class action as an instrument of change was not within my previous experience.

During my first week at ERA, I attended two meetings: one with my co-counsel and one with members from the class. I soon realized that the succinct unity of interest described in the complaint failed to reflect the true sentiment of class members and class counsel. This dose of reality inspired me to research the issue of class certification. What I discovered was vague. Specifically, the case law surrounding class certifications was inconsistent on the issues of typicality, commonality, numerosity and adequacy of representation.[5] Furthermore, the law contained little guidance on how to deal with interclass and/or intraclass conflict.[6] Finally, the respective roles of counsel, class representatives and class members were not well delineated by FRCP 23, the case law, the Canon of Ethics or the Model Code of Professional Responsibility.[7]

Despite this lack of guidance, the litigation continued forward. Interclass and intraclass clashes surfaced but eventually, the problems were solved. Ultimately, the litigants and class counsel were united by a shared goal of fully integrating the SFFD. Toward that end, counsel recognized that the client groups brought their own expertise to the litigation and communication with, and input from, the plaintiff classes became a key component of the decision-making process.

3. *Id.*

4. *Id.* at 7-8.

5. *See* Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 HARV. L. REV. 619, 624 (1986); George Rutherglen, *Notice, Scope and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11 (1983). "Requiring the 'same interest' and the 'same injury,' however does little to clarify the standard of adequate representation. These terms can expand or contract at will." Rutherglen, *supra*, at 14.

6. *See* Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982); William H. Simon, *Visions of Practice*, 36 STAN. L. REV. 469 (1984).

7. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1983); Lawrence M. Grosberg, *Class Action and Client Centered Decision Making*, 40 SYRACUSE L. REV. 709 (1989).

This article traces and describes the achievement of class unity in the *Davis* case. Part I of the article identifies the varied interests of the four plaintiff groups in *Davis* and the role that each group played in the case. In addition, Part I examines the role each group's counsel played vis-a-vis his or her respective client group and the litigation as a whole. Part II reviews the case law and rules of ethics surrounding class actions at the time the *Davis* case was brought. Next, Part III recounts the outset of the *Davis* action when conflicts arose among class members and subclasses. This section analyzes the doctrine relied upon, the steps taken by counsel when no clear-cut doctrine existed for resolving class conflict and, most importantly, the process employed by counsel for making decisions when presented with class conflicts. The article concludes with some recommendations for bringing Title VII[8] class actions where injunctive relief is sought. The perspective presented in the concluding section is that of the author, a civil rights advocate. The recommendations herein encompass my belief that effective work place desegregation is achieved when coalitions of women and people of color work together toward a common goal. Overall, my suggestions are designed to encourage a broad definition of class interest, to promote input from and participation of class members and to monitor and resolve, if possible, class conflicts throughout the process.

I. United We Stand: Black Men, White Women and Black Women Join Forces and File One Action Against the SFFD

Sometime in the fall of 1983, the Lawyers' Committee considered filing an action against the San Francisco Fire Department. The Lawyers' Committee had been contacted by members of the BFA[9], who believed that the SFFD had engaged in discriminatory promotional practices. Specifically, the BFA believed that SFFD promotional exams had an adverse impact against African Americans and were not job related.[10] In addition, members of the BFA who conducted a pretraining program for entry level candidates suspected that the written portion of the 1983 entrance exam was biased and not job related.[11] In all, the BFA wanted the Lawyers' Committee to explore legal action to correct these discrepancies.[12]

8. 42 U.S.C. § 2000e (1988 & Supp. V 1993).

9. Interview with Eva Paterson, Executive Director of the Lawyers' Committee and counsel for BFA in *Davis v. City and County of S.F.*, in San Francisco, Cal. (June 19, 1991).

10. Interview with Battalion Chief Robert Demmons, former President of BFA, in San Francisco, Cal. (Mar. 6, 1991).

11. *Id.*

12. Interview with Eva Paterson, *supra* note 9; Interview with Battalion Chief Robert Demmons, *supra* note 10.

Meanwhile, during this same period, ERA was contacted by women who had taken the 1983 entrance exam. Although these women candidates had successfully completed the written portion of the entrance test, the SFFD declined to hire them because they had performed poorly on the physical agility portion of the exam.[13] At this point in time, the SFFD had no women firefighters. The women who approached ERA believed that the SFFD's physical agility test was designed to maintain the status quo.[14] As a result, these women wanted ERA to initiate action that would result in the hiring of the SFFD's first women firefighters. Many of these women hoped that a solution was possible without protracted litigation.[15]

What eventually became the *Davis* class action originally could have been brought in a variety of combinations. First, three individual lawsuits were feasible: (1) blacks challenging the written portion of the 1983 entry level exam; (2) black men challenging past promotional exams; and, (3) women challenging the physical agility portion of the 1983 entry exam. From these potential separate actions, consolidation was realistic. For instance, it was possible for the black men to initiate a racial bias challenge to the SFFD's entrance and promotional examination procedures, with the women bringing a separate action challenging SFFD's physical agility test. Another consolidation possibility was the two groups of entry level candidates (black men and all women), who could combine forces to challenge the SFFD's entire entrance exam. Had this scenario been adopted, the promotional candidates (African American men) would have had a separate action.[16] The final scenario was one class action, with subclasses, brought by all the aforementioned parties.[17]

Ultimately, the final consolidation option was chosen and one class action with subclasses was filed by the parties. In the fall of 1983, however, this option was hardly a foregone conclusion. Examining the interests of the various groups and the viewpoint of their counsel reveals the benefits and difficulties that one consolidated action presented.

13. Interview with Lt. Anne Young, first women officer in the SFFD, in San Francisco, Cal. (Apr. 17, 1991).

14. *Id.*

15. Interview with Donna Hitchens, former counsel for the original women plaintiffs in *Davis v. City and County of San Francisco*, in San Francisco, Cal. (July 17, 1991); Telephone Interview with Terisa Chaw, former counsel for the original women plaintiffs in *Davis* (Aug. 3, 1991).

16. *See* General Tel. Co. v. EEOC, 446 U.S. 318 (1980). The Court stated that employees and job applicants had different interests and accordingly would be improperly joined together in an employment discrimination class action brought under FRCP 23. *Id.* at 331.

17. *See* Johnson v. Georgia Highway Express, 417 F.2d 1122, 1124 (5th Cir. 1969) (defining class interest broadly).

A. The Interest of the Women

1. The Voices of the Women Plaintiffs

The women who approached ERA in the fall of 1983 had each applied to become entry level firefighters with SFFD. In successfully completing the first hurdle of the entry exam, each woman had passed the written test. However, in performing the physical agility portion of the test ("PAT"), each woman either failed or scored so poorly that an offer for a position with the SFFD would not be extended.[18] Of the ten women who initially approached ERA, eight were white and two were black. In relating their situation, the women informed ERA that about 100 other women had taken the PAT and all but five had failed.[19] Under the standard set out in *General Telephone Co. v. Falcon*,[20] these women appeared to be perfect class representatives; there were common questions of law and fact and each woman suffered the same injury and sought the same remedy: entry into the SFFD. Moreover, the claims of the women were typical of other women who had passed the written test but did not survive the PAT.

Although the women's claims met the legal standards set out in *General Telephone*, the outlook of these ten potential class representatives was quite varied. For some, getting a job with the SFFD meant eradicating the source of the discriminatory hiring. For most, it simply meant accepting any deal with the City which resulted in jobs for all class members, particularly for the ten original complainants.

As one applicant remembered:

> We were a diverse group with one common goal, to be among the first women firefighters in the City of San Francisco. Some of us considered ourselves feminists and were ready to take on any system that discriminated against women; most of us just wanted jobs. A lot of the women believed that with the help of ERA we could get the City to cave in quickly and come up with an offer to give some women jobs without ever really going to court. We figured the City was embarrassed of the fact that San Francisco was one of the remaining major US cities without women on the force. We had heard through the grapevine that the City was considering giving women applicants another shot at the physical

18. The 1982 San Francisco Civil Service Job Announcement for the Position of H-2 Firefighter set out the requirement for entry level firefighters. Applicants had to be 18 years of age, have a high school diploma or GED equivalent, be a resident of the City and County of San Francisco, and pass the written portion of the test which then allowed the applicant to take the PAT. Final selection was to be based upon a candidate's score on the PAT.

19. Interview with Lt. Anne Young, *supra* note 13. The five women who initially passed the PAT were white. The candidate with the highest score was number 1100 on the eligibility list. Since the SFFD was expected to hire somewhere between 200-300 firefighters none of these women stood any realistic chance of obtaining a position.

20. 457 U.S. 147, 157-58 (1982) (setting forth the standards for the commonality, typicality and adequacy of representation requirements of FRCP 23).

> agility test and then hiring all the women who passed either the original test or the retest, regardless of their score. Many of us just wanted ERA to see if there was any truth to that rumor and then help make it happen.
>
> Some of the women had heard that any deal offered by the City would be objected to by the Black Firefighters Association. I found that hard to believe since the BFA had given physical fitness training courses which were open to women of all races. They seemed to be the only men in the Department which didn't object to women coming on the force.[21]

Another woman candidate recalled:

> I had been married to a black firefighter. My ex-husband joined the force in 1974 and faced discrimination his entire career. I harbored no illusions about a quick settlement given how pervasive the discrimination was. I was also very suspicious of any quick fix offered by the City. I wanted to see a long term solution. Perhaps because I was black I knew that tackling discrimination would be a long battle. I was also aware that many of the other black women who had applied to be firefighters had never made it to the PAT. They had flunked the written test and did not get the chance to move on to the next hurdle—giving a second PAT wouldn't help them. They needed a non-biased written test. I thought we should challenge the whole entrance test.[22]

The initial sentiments of the women clients illustrated that the goal of bringing women into the SFFD could take many forms. First, the ten women could simply strike a deal with the City of San Francisco, resulting in the one-time hiring of some women. Alternatively, an action could be brought which challenged the PAT and implemented a new testing device free of adverse effects towards women. Finally, the entire entrance exam could be challenged so that significant numbers of black women and white women would have the opportunity to become firefighters. From the comments of the women, it was clear that agreement on strategy among the class members was going to be difficult.

2. The Viewpoint of the Women's Lawyers

The two attorneys working for ERA in the fall of 1983, Terisa Chaw and Donna Hitchens, believed that the claims of the women met the requirements for a class action.[23] For these two advocates, the more difficult question was obtaining consensus on a course of action that was in the best interest of all of the class members. ERA had extensive experience in bringing women into non-traditional jobs.[24] From their collective experi-

21. Interview with Lt. Anne Young, *supra* note 13.

22. Interview with Kathryn D. Morrison, class member and former SFFD probationary firefighter at San Francisco Housing Authority, in San Francisco, Cal. (May 15, 1991).

23. Telephone interview with Terisa Chaw, *supra* note 15; Interview with Donna Hitchens, *supra* note 15.

24. In 1982, ERA represented women attempting to gain admission into the Apprenticeship Programs for the Trades in the state of California and the United States Department of Forestry.

ences, Ms. Chaw and Ms. Hitchens knew that a long term, successful desegregation scheme would require the permanent removal of discriminatory hiring barriers. Both attorneys were therefore skeptical of a one time hiring proposal. At the same time, they recognized their obligation, as attorneys, to explore and discuss any offer put forth by the City of San Francisco with their clients. Ms. Chaw and Ms. Hitchens further recognized that a large gulf existed between the remedies required for the black women who had yet to pass the written test and the five white women who were actually on the eligibility list.[25]

According to Donna Hitchens:

> Our first task was to explore whether the women who came to our office in the fall of 1983 truly wanted to bring a class action or if they simply wanted to secure jobs for themselves. The women agreed from the outset that they wanted to take on a class action. It was unclear to me, however, whether that class included women who had not even passed the written test. As a public interest law firm with particular emphasis on the economic status of two income and minority women, Equal Rights Advocates clearly supported a definition of the class which would include addressing the problems of minority women who had difficulty with both the written test and the PAT. It was also my strong belief that a solution which benefitted all women would be, in the long run, the best remedy for the women who originally came to my office. I was not as confident, however, that I would be able to persuade my clients of this.[26]

Meanwhile, Terisa Chaw recollected:

> In retrospect one of the best things to happen in the early stages of the litigation was the rumor that black men were going to object to any proposal put forth by the City to bring women into the Department. That rumor prompted Donna [Hitchens] to call Eva Paterson, the lawyer for the black firefighters. We learned that the black firefighters for the most part supported the goal of bringing women into SFFD. The rumor stemmed from the black firefighters' belief that the City was going to offer the women a meager solution and, at the same time, attempt to divide the interests of blacks and women. Eva and Donna decided to hold a meeting with both sets of clients so that they could find out directly from another what their thoughts and opinions were.[27]

The women who initially approached ERA, members of the BFA and their respective counsel had a meeting. In addition to the above participants, the BFA invited some black women applicants who had failed at

25. Telephone interview with Terisa Chaw, *supra* note 15; Interview with Donna Hitchens, *supra* note 15.

26. Interview with Donna Hitchens, *supra* note 15.

27. Telephone interview with Terisa Chaw, *supra* note 15. The ease of communication between counsel from ERA and counsel for the Lawyers' Committee was due in large part to the organizations' history of working together. In fact, Eva Paterson was a member of the Board of Directors of ERA. The fact that these two public interest civil rights organizations had other successful attempts at collaboration did indeed affect the strategy chosen in this litigation.

least one portion of the entrance exam. These women had contacted the BFA and wanted the organization to assist them in securing employment with the Department.[28]

Donna Hitchens recalled:

> It was at that meeting that the women came together and agreed on the definition of class interest. When confronted with the problems faced by the black women who had contacted the BFA, our clients recognized the need to find a solution which remedied both race and sex discrimination. It was not a unanimous decision by any means; and for some it was a bitter pill. As counsel for the class, I believed that it was clearly in the best interest of the class members. I don't believe that any of us realized at that time how complex the litigation would become by our decision to take the high road.[29]

B. The Interests of the Black Men

The members of the Black Firefighters Association had more than a passing familiarity with discrimination within the San Francisco Fire Department. Many of them had been hired pursuant to a court-ordered, race-conscious remedy put into place on a temporary basis by United States District Judge Sweigert in an earlier round of litigation against the SFFD. That case, *Western Addition Community Organization v. Alioto*,[30] was an action filed in 1970 by the NAACP and other community organizations. The action alleged that the entry examinations used by the San Francisco Fire Department discriminated against minority men.[31] The lawsuit was filed as a class action and alleged violation of the Civil Rights Act of 1964. The case was settled in 1977 by entry of a consent decree which provided that the Department would develop new entry examinations.[32] However, the decree did not contain any affirmative relief, such as hiring goals and timetables.[33]

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28. Interview with Battalion Chief Robert Demmons, *supra* note 10.

29. Interview with Donna Hitchens, *supra* note 15.

30. 369 F. Supp. 77, 80-81 (N.D. Cal. 1973), *aff'd*, 514 F.2d 542 (9th Cir.), *cert. denied*, 423 U.S. 1014 (1975) [hereinafter *WACO IV*]. The court ordered one minority hired for each white hired in *WACO IV*. During the course of the *WACO* litigation, three other decisions were reported: Western Addition Community Org. v. Alioto, 360 F. Supp. 733 (N.D. Cal. 1973) [hereinafter *WACO III*]; Western Addition Community Org. v. Alioto, 340 F. Supp. 1351 (N.D. Cal. 1972) [hereinafter *WACO II*]; Western Addition Community Org. v. Alioto, 330 F. Supp. 536 (N.D. Cal. 1971) [hereinafter *WACO I*]. In 1977, the litigation ended when the parties entered into a five-year consent decree which established new guidelines for the development of the Fire Department's entrance exam. No affirmative relief was contained in the decree.

31. *WACO IV*, 369 F. Supp. at 79 n.1.

32. *See* Western Addition Community Org. v. Alioto, No. C-70-1335 (N.D. Cal. 1977).

33. *Id.*

In 1980, ten years after the *WACO* action was filed, black men commenced another action against the SFFD, *City and County of San Francisco v. Fair Employment and Housing Commission*.[34] Between June and September of that year, black firefighters filed ten complaints with the California Department of Fair Employment and Housing ("DFEH") alleging that the promotional examination given by the SFFD in 1978 for the position of lieutenant discriminated on the basis of race.[35] In response to the allegations, the DFEH issued a formal complaint and held an administrative hearing before the Fair Employment and Housing Commission ("FEHC"). The Commission concluded that the test discriminated against the complainants and was invalid.[36] Despite the findings from the decree entered in the *WACO* litigation, the City of San Francisco apparently believed that the Commission had erred in its finding of discrimination and sought a writ of administrative mandamus from a California superior court. A writ was obtained and the decision of the FEHC was overturned.[37]

It was during this period of time that the BFA began to look for counsel to represent them in a class action against SFFD. Initially, the BFA hoped to resolve the matter through the state administrative process, without the aid of counsel. However, that expectation was quickly dashed when the City of San Francisco decided to challenge the Commission's findings and seek a writ of mandamus.[38]

1. The Voices of the Black Men

Robert Demmons, who served as president of the Black Firefighters Association from 1979 until 1991, took the 1978 lieutenant's exam. He knew, prior to taking the exam, that black firefighters had less opportunity than white firefighters to attend review classes and obtain study materials. He wanted all of the approximately 35 black firefighters who had taken the exam to file charges of discrimination with the San Francisco Civil Service Commission immediately following the exam administration. He was only able to convince six black firefighters to protest the exam.

> Although the majority of the approximately 35 black firefighters who took the 1978 lieutenant's examination believed that it was discriminatory, we did not all agree on what, if any, action should be taken. Many believed that, despite the discriminatory treatment, they might have

34. *See* City and County of S.F. v. Fair Employment and Hous. Comm'n, 191 Cal. App. 3d 976 (1987).

35. *Id.* at 980.

36. The Commission found that the test was not job related because skills needed to be an officer within the SFFD were not tested. *Id.* at 982.

37. *Id.* at 982, 990, 994.

38. Interview with Battalion Chief Robert Demmons, *supra* note 10.

> done well enough to get promoted and did not want to do anything before the list of candidates for appointment came out. Of course, the Civil Service Rules are designed to make you take action before you know how well you did.[39]

When the list of firefighters who had passed the lieutenant's exam was posted by the City, only six black firefighters were on it.[40] Of the six, only three had scored well enough to have any chance of being immediately appointed to the rank of lieutenant. Ironically, three of the black firefighters who had passed the exam were among the initial six who were willing to file protests with the Civil Service Commission.

> From the beginning of the struggle, conflicts existed. Some of the men who passed the 1978 lieutenant's exam and were on the eligibility list did not want any action taken which would jeopardize their appointment. It is hard to argue that an exam is unfair and it should be thrown out, and then add-on, by the way, that same exam should be considered valid for the few black firefighters who passed it. On the other hand, the exam results helped to convince some members of the association that some sort of action needed to be taken in order to stop the Department from giving discriminatory tests.[41]

Once the black firefighters learned that the Civil Service Commission would take no corrective action, Demmons, now president of the BFA, convinced ten members to file charges with the Department of Fair Employment and Housing. Demmons believed that the administrative process would cure the adverse impact that the exam had on blacks without destroying the Black Firefighters Association.[42] Demmons' hunch was indeed accurate as the DFEH Commission found the exam discriminatory and devised a remedy which extended the passing score.[43] As a result, more blacks (as well as some whites) were added to the eligibility list without harming blacks who had originally passed the exam.[44]

> The Commission's ruling was a great success. It helped unite the BFA and served as a lesson that it is worthwhile to take risks for the greater good. Of course it was a short lived success since the City immediately appealed the ruling and the court found in the City's favor. We were then faced with the same conflict within the association: do we go forward for the greater good and risk losing the appointments of a few black lieutenants?[45]

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39. *Id.*

40. Civil Service H-20 Eligibility List, 1978.

41. Interview with Battalion Chief Robert Demmons, *supra* note 10.

42. *Id.*

43. *See* City and County of S.F. v. Fair Employment and Hous. Comm'n, 191 Cal. App. 3d 976 (1987).

44. *Id.*

45. Interview with Battalion Chief Robert Demmons, *supra* note 10.

The Black Firefighters Association, under the strong leadership of Robert Demmons, decided to continue the struggle to end the discriminatory promotional practices of the San Francisco Fire Department. Two actions were taken: (1) the BFA looked for legal representation to continue the action initiated by the Department of Fair Employment and Housing; and, (2) the BFA filed an administrative complaint with the United States Office of Revenue Sharing, arguing that the Fire Department's federal funding should be withheld because of its discriminatory practices.[46] Although behind-the-scenes conflicts among BFA members never disappeared, decisions on behalf of the organization had been made and a firm course of action had begun.

In addition to challenging the promotional exams, the BFA was engaged in many other projects. Sometime in 1981, the BFA launched a recruiting program for the upcoming 1982 entrance exam. Although the program was aimed at all minority groups, recruitment of African Americans was the organization's primary goal. Included in that goal was the recruitment of African American women. The recruiting effort was a success, resulting in the immediate realization that a comprehensive pretraining program was necessary. Failure to develop such a program would deprive applicants of a better opportunity to pass the entrance exam.

Frustrated by the City's unwillingness to devise such program, the BFA assembled its own pretraining program for the written and physical agility portions of the entrance exam. Robert Demmons knew the speed and upper body strength required by the physical agility exam would adversely impact the women. Similarly, he believed that the timed reading comprehension portion of the written exam would have an adverse impact on blacks. Predictably, the program emphasized building these skills. Both parts of the BFA pretraining program were open to all entry level candidates, although an overwhelming majority of the participants were black. Several white women, however, participated in the portion of the program devoted to the physical agility test.[47]

> We had so much fun with the pretraining program. We even had a TV news crew appear during one of our practice exams. A white firefighter had falsely accused us of having the official entry test and administering it to our participants before the actual test date. The media believed the tip. Were those guys embarrassed! But despite the hard work of the instructors and the candidates, we knew it was an uphill battle since the Department had never given anything but biased exams. I

46. On February 20, 1980, the BFA filed a complaint with the Office of Revenue Sharing, Department of the Treasury, under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 6701 (1988) (repealed 1986).

47. Interview with Battalion Chief Robert Demmons, *supra* note 10.

> was given a description of the test components after the test was administered and before the results were released. From the description I received, I was able to identify which parts of the test would eliminate women and which parts would adversely impact blacks. I sent my analysis to the Civil Service Commission. My predictions were right on target.[48]

While the BFA was busy training applicants, it successfully obtained counsel to challenge the 1978 promotional exam. The public interest law firm, San Francisco Lawyers' Committee for Urban Affairs, agreed to represent the BFA and the Lawyers' Committee retained the law firm of Pearl, McNeill, Gillespie & Standish to serve as its co-counsel. Once the 1982 entry exam results were received, the BFA wanted to expand the issues of its lawsuit. The physical agility exam, as predicted by Robert Demmons, virtually eliminated women while the written portion of the test had an adverse impact against black men.[49] In deciding whether to pursue an entry level challenge, the BFA canvassed many of the BFA training program participants to gauge exam results. Upon learning that many of the most talented participants had failed one portion of the test, the BFA inquired into the applicants' interest in legal action. After receiving a positive response from the candidates, the BFA relayed the information to its lawyers. "At that time we saw a class action brewing, we didn't distinguish between entry and promotional issues, men's and women's claims or see any problems presented by the fact that some of the top applicants on the list were black men."[50]

2. The Viewpoint of the BFA Lawyers

The BFA retained Eva Paterson of the Lawyers' Committee and William C. McNeill III from Pearl, McNeill, Gillespie & Standish to represent them in their challenge of the SFFD's promotional practices. After a couple of meetings with the Executive Board of the BFA, Ms. Paterson and Mr. McNeill both recognized that the problems of discrimination within the SFFD were deeper than the City's failure to develop non-biased promotional exams.[51]

> Stories emerged involving harassment of black firefighters once the BFA challenged the 1978 promotional exams; . . . it was also clear that the City had not followed through on its commitment to vigorously re-

48. *Id.*

49. Davis v. City and County of S.F., 890 F.2d 1438 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 248 (1990).

50. Interview with Battalion Chief Robert Demmons, *supra* note 10.

51. Interview with William McNeill, Managing Attorney for the Employment Law Center, former partner in the law firm Pearl, McNeill, Gillespie & Standish and counsel for BFA in *Davis v. City and County of San Francisco*, in San Francisco, Cal. (June 19, 1991).

> cruit and pretrain minority and women applicants and the burden and expense had fallen on members of the BFA; and given the City's history, we had every reason to believe the BFA when it informed us that the entrance exam was going to have an adverse impact upon minorities and probably eliminate women completely.[52]

Ms. Paterson was immediately struck by the hard work and dedication of the BFA's Executive Board and its apparent goal of ending all forms of discriminatory conduct against minorities and women. Given the BFA's broad commitment to minorities and women, Paterson was shocked when her friend and colleague from Equal Rights Advocates, Donna Hitchens, called her and asked if the BFA intended to take action against the City if jobs were offered to women. Specifically, it was rumored that the BFA would seek a temporary restraining order if the City attempted to implement its plan of selectively certifying and hiring, out of rank order, women who had passed the physical agility test. "I knew those guys and I knew that the information Donna had received was incorrect. Donna was relieved to learn of my impression. We both believed that the best strategy was to hold a meeting with all concerned parties and see if we could join forces."[53]

Because many client meetings occurred throughout the course of the litigation, Ms. Paterson did not have a clear recollection of the first joint meeting. However, she did retain a strong overall image of client meetings.

> My impression of client meetings as a whole is pretty vivid: packed conference rooms, people yelling at one another. They were often like an intense family scene where members of a family confront one another, eye to eye, and hash out their differences. By the end of an evening, decisions were made and, as is generally the case following emotional confrontations, someone left the meeting angry.[54]

Ms. Paterson further recalled that she was impressed that the women, who risked losing job opportunities, opted to join forces with the black applicants. She attributed two reasons for the women's decision. First, Donna Hitchen's effective advocacy. Second, some of the women had benefitted from their participation in the BFA retraining program. As for Ms. Paterson, she never had doubts that the two groups should join forces and bring one action against the City.

> Perhaps because I'm a black woman who is both a feminist and a black activist and am unable to neatly separate out either part of my being that I instantly concluded that the whole vision had to be advanced. I was not particularly concerned about the conflicts among and within the subclasses. I knew that decisions would be made which had as their bottom

52. Interview with Eva Paterson, *supra* note 9.

53. *Id.*

54. *Id.*

> line that you do not cut deals which leave out any of the victims of discrimination.[55]

Meanwhile, Paterson's co-counsel, Bill McNeill, was not convinced at the outset that bringing one lawsuit was the best strategy. McNeill was extremely concerned about interclass and intraclass conflict. Furthermore, he was looking ahead at how to structure a convincing class certification motion. He knew that even a lawsuit brought solely on behalf of black men presented innumerable problems. Specifically, recent case law looked unfavorably at bringing entry and promotional claims in one case.[56] Moreover, conflicts were already developing between blacks who had passed and blacks who had failed the entry and promotional exams. In McNeill's opinion, bringing a lawsuit which included women, especially white women, only added additional conflicts and uncertainty. White women had performed well on the written test and as a result, McNeill feared that they would not truly support a challenge of that exam component. On the other hand, black men had performed well on the physical agility test and, due to that success, might not support an all out challenge of the PAT.

Finally, McNeill worried about collaborating with Equal Rights Advocates. In particular, FRCP 23 required adequate class counsel.[57] Knowing that both Ms. Hitchens and Ms. Chaw were soon leaving ERA, McNeill was concerned whether their replacement had the requisite experience to take on a complicated Title VII matter.[58]

Ultimately, McNeill was persuaded to bring one action.

> Frankly, I was surprised by the support for one lawsuit which came from the members of the Black Firefighters Association. Although some of them were a bit suspicious of the motivations of the white women, the general feeling was one of support. The BFA also sensed that the San Francisco Civil Service Commission was going to try to play white women off against black men and the men wanted to preempt that strategy. My co-counsel reassured me that the class certification problems were not insurmountable. In all, the enthusiasm of my co-counsel and of the clients convinced me that we should go forward with one lawsuit.[59]

Although McNeill's initial reaction differed from that of his co-counsel, his philosophy about the goal of Title VII litigation was virtually identi-

55. *Id.*

56. Interview with William McNeill, *supra* note 51. *See also* General Tel. Co. v. EEOC, 446 U.S. 318, 331 (1980).

57. *See* FED. R. CIV. P. 23(a)(4).

58. Interview with William McNeill, *supra* note 51. Adequate representation requires that class counsel be qualified, experienced and generally able to conduct the litigation. *See* Bachman v. Pertschuk, 437 F. Supp. 973 (D.C. Cir. 1977); *see also* Kelly A. Freeman, *Conflicts of Interest in Class Action Representation Vis A Vis Class Representative and Class Counsel*, 33 WAYNE L. REV. 141, 145 (1986).

59. Interview with William McNeill, *supra* note 51.

cal. "Your obligation is to those who have been completely frozen out by the Department, those most injured by discrimination."[60] Moreover, Mr. McNeill's decision was an example of how many differences were worked out throughout the litigation. He listened to the reasons put forth by his colleagues and his clients and accepted the sentiments of the group. It was the beginning of a model for collaboration.

At the outset, counsel and clients appeared to have a common goal: the elimination of the discriminatory entry and promotional barriers erected by the SFFD. Toward that end, one complaint was drafted and filed. The attorneys, especially Bill McNeill, recognized that agreement among the class on tactics and strategy was an enormous challenge. Complete consensus could never be expected. Unfortunately, the Federal Rules, case law and canons of ethics provided the lawyers with little guidance. Specifically, the existing authority lacked clear direction on defining class interests, on assigning primary responsibility for shaping class interests and on what mechanisms should be employed for resolving class conflicts.

II. Defining Class Interest and Resolving Class Conflict

The legislative history surrounding the drafting and implementation of FRCP 23 indicates that civil rights actions were contemplated as a potential type of class action litigation.[61] In fact, the Advisory Committee Notes specifically mention civil rights cases as an example of a class action lawsuit acceptable under the Federal Rules of Civil Procedure.[62] Because FRCP 23 was drafted prior to the passage of Title VII of the 1964 Civil

60. *Id.*

61. *See* FED. R. CIV. P. 23. Rule 23(a) states in pertinent part:

> Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id. at 23(a).

62. *See* FED. R. CIV. P. 23 advisory committee's notes, 29 F.R.D. 69, 100 (1966). Rule 23(b)(2) states:

> Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

FED. R. CIV. P. 23(b)(2).

Rule 23(c)(2) and (c)(3) set out what types of actions require notification of the class or require members to opt out in order to be excluded from a judgment. Subsection (c)(2) states in part, "(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual

Rights Act and the amendments to the rule were implemented when Title VII was still quite new, legislative history was likely referring to school desegregation cases where civil rights cases were concerned.[63]

Although school desegregation cases are not without class conflict,[64] these late 1950s and early 1960s cases posed different problems than the SFFD case. Unfortunately, FRCP 23 and relevant case law do not reflect the special, complex problems posed by employment desegregation actions. For example, school desegregation actions generally involved only one racial group. Meanwhile, gender was not a factor in school desegregation. Furthermore, school desegregation actions involved remedies (busing or school reassignment) that, in theory, were available to all members of the class.

In contrast, the SFFD case ultimately involved three racial groups—blacks, Asians and Hispanics—and women; women were further divided between women of color and white women. Moreover, in the action against SFFD, remedies were not uniform; some of the plaintiffs sought more than declaratory and injunctive relief typical of Title VII actions. Specifically, back pay and damages for racial harassment were requested pursuant to the Civil Rights Act of 1866.[65] Because remedies available in Title VII often put class members at odds with each other, defining class interest was a daunting task. For the lawyers drafting the SFFD complaint, the case law defining class interest was ill defined.[66]

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notice to all members who can be identified through reasonable effort . . . ." *Id.* at 23(c)(2). Subsection (c)(3) states in part:

> The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court find to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

Id. at (c)(3).

63. *See* Note, *Due Process Rights of Absentees In Title VII Class Actions*, 59 B.U. L. REV. 661, 666 (1979).

64. *See* Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

65. 42 U.S.C. § 1981 (1988).

66. Although General Telephone Co. v. Falcon, 457 U.S. 147 (1982), established that simply being a member of the same race or ethnic group was not sufficient to establish that the class possessed the same interests and suffered the same injury, it left open many questions about the nature of those interests and injuries. *See Certifying Classes and Subclasses in Title VII Suits*, *supra* note 5.

A. Defining Class Interest

At the time of the SFFD litigation, the FRCP 23 notion of class interest litigation required that legal and factual questions in a class action lawsuit be common to the class members and that the claims of the class representatives be typical of those of class members.[67] Closely related to the concept of typicality is the requirement that the class representatives adequately represent the members of the class.[68]

The definition of class interest originates in the landmark case *Hansberry v. Lee*.[69] There, enforcement of a racially restrictive covenant covering 500 land parcels was sought against a seller and purchaser of one such parcel.[70] The parties seeking enforcement relied in part on a previous court ruling which had upheld the restriction.[71] Arguing that the seller and purchaser were members of the class represented in the prior lawsuit, the parties seeking enforcement claimed res judicata.[72] In rejecting the res judicata claim, the Supreme Court held that the purchaser and seller were clearly not in the same class as those persons who sought enforcement of the covenant.[73] According to the Court, there was an obvious conflict of interest between parties seeking to secure the benefits of an agreement and those choosing to resist enforcement.[74] The importance of this pre-FRCP 23 holding lies in its recognition that the interests of representative class members must be aligned with those of absent class members. A conflict between a purported class member and class representatives removes the member from the class. The same principle has been applied in defining class action interest in post-FRCP 23 actions, including Title VII cases.

In 1977, when the Supreme Court examined the issue of class interest in a Title VII case, the Court decertified a class because the interests of the class representatives were not aligned with those of the members.[75] The class representatives, who were Mexican American employees, alleged that the defendant's job transfer system was discriminatory and had prevented them, as well as other minority employees, from obtaining better positions

67. *See* FED. R. CIV. P. 23(a).

68. FRCP 23(a)(4) states: "One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . . (4) the representative parties will fairly and adequately protect the interests of the class." *Id.* at (a)(4).

69. 311 U.S. 32 (1940).

70. *Id.* at 37, 38.

71. *Id.* at 38.

72. *Id.*

73. *Id.* at 40-41.

74. *Id.*

75. East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977).

within the company.[76] The Court found that, notwithstanding the defendant's transfer system, the plaintiff representatives did not possess the skills necessary for obtaining job transfers.[77] Next, the Court concluded that the plaintiffs' claim did not typify the claims of qualified minority applicants for whom the transfer system may have indeed operated as a discriminatory barrier.[78] Thus, the named plaintiffs could not adequately represent the interests of qualified applicants, whom the named plaintiffs had designated as members of the class. Although a clear conflict did not exist between the class representatives and class members, the nexus between the two classifications was not close enough to certify the class action. Despite denying the certification, the Court reinforced the notion that civil rights actions are often brought as class actions: "[s]uits alleging racial or ethnic discrimination are often by their nature class suits. . . . Common questions of law are typically present."[79]

Without clear direction from the Supreme Court, district and circuit courts wrestled with the definition of class interest in Title VII cases during the late 1970s and early 1980s. Adhering to the view that civil rights cases often involve factual and legal issues pertaining to a class, the Ninth Circuit held that FRCP 23 should be interpreted and applied liberally "so as not to undermine the purpose and effectiveness of Title VII in eradicating class-based discrimination."[80] Representing that liberal view, one district court in Mississippi allowed a class action to be maintained against three different city agencies.[81] Despite inherent differences between agencies, that court ruled that the city's alleged discriminatory conduct was generally applicable to the class, who were black employees.[82] Further adopting the Ninth Circuit's liberal view, other courts certified classes even when some members objected to the particular remedy sought in the pleadings.[83]

Meanwhile, representing a more restrictive view of class interest, the Fifth Circuit refused to certify a class because the defendant had engaged in many different types of discriminatory practices.[84] Following that more

76. *Id.* at 403.

77. *Id.* at 403-04.

78. *Id.*

79. *Id.* at 405.

80. Gay v. Waiters' and Dairy Lunchmen's Union, 549 F.2d 1330, 1334 (9th Cir. 1977).

81. NAACP v. City of Corinth, 83 F.R.D. 46 (N.D. Miss. 1979). This case was a class action filed on behalf of employees working in the Police Department, Fire Department and Department of Administration. *Id.* at 49.

82. *Id.*

83. Evans v. Buchanan, 416 F. Supp. 328 (D.C. Del.), *appeal dismissed*, 429 U.S. 973 (1976).

84. Hines v. D'Artois, 383 F. Supp 184, 188 (N.D. La. 1974), *rev'd on other grounds*, 531 F.2d 726 (5th Cir. 1976).

conservative approach, other courts found that dissenters within the purported class removed the unity of interest necessary for maintaining a class action.[85]

In 1982, two years before the *Davis* plaintiffs filed their action, the Supreme Court revisited the issue of class interest in *General Telephone Co. v. Falcon.*[86] Significantly, that case examined an issue present in the *Davis* action. That is, whether or not employees can adequately represent the interests of job applicants. The Court found that the class representative, a Mexican American, had an individual cause of action against the defendant for its failure to promote him.[87] The Court did not, however, find that the employer's action vis-a-vis the plaintiff amounted to a policy of discrimination which affected job applicants.[88] In short, the plaintiff's legal and factual questions were not common to the class and the plaintiff's claims were not typical of the class. In a footnote, the Court left open the question of whether or not an employee could represent a class of job applicants where the discriminatory practice was the development and administration of biased entrance and promotional examinations.[89] Again, the case law failed to provide clear guidance to the *Davis* legal team.

In determining whether or not a named plaintiff can adequately represent the class, courts consider whether the representative is a member of the minority group affected by the alleged discriminatory practice and whether he or she has suffered the same injury as the class.[90] In addition, the judge must determine if the class representative can vigorously and tenaciously prosecute or defend the interests of the members.[91] To make this determination, courts examine factors such as the representative's place of residence and consider the geographic dispersion of the class. In employment discrimination cases, the courts may further compare the representative's employment status and job classification with those of the members in the class.[92] Overall, adequacy of representation in Title VII cases, which are

85. Bailey v. Ryan Stevedoring, 528 F.2d 551 (5th Cir. 1976), *cert. denied*, 429 U.S. 1052 (1977).

86. 457 U.S. 147 (1982).

87. *Id.* at 160-61.

88. *Id.* 156-58.

89. *Id.* 159 n.15.

90. *Id.* at 156.

91. *Id.* at 157.

92. *See Certifying Classes and Subclasses in Title VII Suits*, *supra* note 5; *Due Process Rights of Absentees In Title VII Class Actions*, *supra* note 63.

generally "(b)(2)" actions, can be critical because there is no notice requirement or opt out provision.[93]

Clearly, defining class interest and assuring adequacy of representation were chief concerns for the *Davis* team. However, Bill McNeill was largely worried about conflicts within and among members of the subclasses. Again, the case law was sparse. Courts appeared to treat the issue of conflict in a cavalier manner, erring on the side of allowing actions to proceed if only potential and not actual conflicts existed.[94] Despite this general ignorance of potential conflict, courts often initially required certification of subclasses where a potential conflict existed among groups within a class.[95]

In defining subclass interest, courts have used the standards developed for class interest. FRCP 23 specifically provides that a class may be divided into subclasses and each subclass treated in the same manner as a class.[96] Courts approving the use of subclasses have done so in cases where the interests of an identifiable group of class members are similar to, but not completely aligned with, another group of class members. This mechanism allows a group of plaintiffs to bring one action while recognizing differences within the group.

An examination of cases discussing the appropriateness of forming subclasses indicates that the courts have taken a varied and sometimes inconsistent approach to their formation. For example, *Vuvanich v. Republic National Bank*[97] upheld the use of subclasses in an employment discrimination case where an actual conflict existed within the original class. There, the original class consisted of all women and blacks who had applied to

93. Notice was not required because the drafters of FRCP 23(b)(2) believed that all class members would benefit from injunctive and declaratory relief. *Title VII Classes and Due Process: To (b)(2) or not to (b)(3)*, 26 WAYNE L. REV. 919, 921 (1980).

94. *See* Blackie v. Barrack, 524 F.2d 891, 895 (9th Cir. 1975) (declining to defeat a class action at the onset of litigation because of a potential damage conflict and stating that the conflict must be apparent, imminent and on an issue at the heart of the suit); *see also* Marshall v. Holiday Magic, 550 F.2d 173 (9th Cir. 1977) (holding that interclass conflicts would not defeat a class action because no there was no intra-class conflict).

95. *See* Susan Bisom-Rapp, *The Use of Subclasses In Class Action Suits Under Title VII*, 9 INDUS. REL. L.J. 116 (1987). Bisom-Rapp proposes using subclasses in the following three ways: (1) where there is an actual or potential conflict of interest between either the named representative and the putative class or among the putative class members; (2) where the class is so large or the issues so complex that subclasses are needed for case management purposes; and (3) where the interests of the class are divergent; e.g., the strict requirements of typicality and commonality are not met, yet there is not a conflict. *Id.* at 122-39.

See Airline Stewards and Stewardesses Ass'n v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

96. FED. R. CIV. P. 23(c)(4). "When appropriate . . . (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." *Id.*

97. 82 F.R.D. 420 (N.D. Tex. 1979).

work for or had worked for the defendant during a finite time period.[98] Subclasses of blacks and women were later certified when the evidence showed that the employer's preference of hiring white women over black women created a conflict between these groups.[99]

In many cases, however, where the use of subclasses could solve the problems of potential conflicts among class members or divergent class interests, the courts have simply denied class certification.[100] In *Eastland v. Tennessee Valley Authority*,[101] for example, the court limited the class to employees with the same job classification as the class representatives, who were salaried employees from one bargaining unit of a union. The plaintiffs had sought certification of a class which included job applicants, managerial employees and employees in a different bargaining unit of the union. Instead of forming subclasses to accommodate the possibility of divergent or conflicting class interest, the court simply excluded the other groups from the class.[102] Again, similar to uncertainties in the law regarding class definition and adequate representation, the law surrounding use of subclasses provided conflicting signals for the *Davis* legal team.

B. Handling Class Conflict

1. The Rules of the Game

Resolving class conflict is a significant obstacle to maintaining a class action. An initial hurdle to conflict resolution is the process of defining class interests. As developed in the case law, class interest is often treated as a static state of affairs which is defined at the outset of the litigation and does not change during the course of litigation.[103] Thus, there is little case law and theory addressing conflicts which occur during the course of litigation.

98. *Id.* at 426.

99. *Id.*

100. *See* Walker v. Jim Dandy Co., 747 F.2d 1360 (llth Cir. 1984).

101. 704 F.2d 613 (11th Cir. 1984).

102. *Id.* at 618.

103. *See Certifying Classes and Subclasses in Title VII Suits*, *supra* note 5. The author points out the interests of class members may diverge at several key points during a lawsuit and the court has the option of forming or reforming subclasses at any one of these points. For example, at the initial stage of a case, the members may differ about the desirability of litigation; interests may also diverge at the liability stage because named plaintiffs become focused on their own claims, rather than the broader interests of the class; and finally, interest may diverge at the remedy stage over proposed injunctive relief or the amount of damages.

However, Professor Rhode points out that as a general matter, it is only at the certification stage, where conflicts and divergences are least visible, that courts review the problem of class interest and adequacy of representation. *See* Rhode, *supra* note 6, at 1220.

Lack of clarity on the respective roles of class members, class representatives and class counsel is another obstacle to the resolution of class conflict. Class representatives are supposed to typify class members and adequately represent members' interests. However, typicality and adequate representation have been defined in a narrow and legal manner. Simply, typicality exists when the representatives' claims mirror those of the class members while adequate representation is generally found when class members and class representatives suffer the same injury and are members of the same minority group. Beyond these narrow definitions, no attempt is made to ascertain whether the representatives' commitment to and strategies for litigation are indicative of class members. In fact, by making the decision to bring a class action, class representatives often exhibit risk taking and leadership qualities which differ from those of the class. As a result, representatives may be willing to make decisions regarding litigation strategy that do not represent the intentions of all class members.[104] In civil rights actions, for instance, it is often the maverick individual who is willing to take personal risks for the greater good. Often, these are risks that class members would not personally assume.

While class conflicts during litigation create typicality and adequate representation difficulties, a greater problem is the lack of clarity in the Federal Rules and accompanying case law regarding decision-making authority. Specifically, who among class counsel, class representatives and class members has ultimate decision-making authority in class action cases? At the time of the SFFD action, the Model Code of Professional Responsibility delineated the line of authority between attorney and client during litigation.[105] Unfortunately, these rules do not apply well to class action cases. The Model Code grants to the client the exclusive authority to make decisions which substantially affect the merits of the case.[106] Toward that end, a lawyer is obligated to use best efforts to ensure that the client has all pertinent information necessary for making decisions.[107] Meanwhile, deci-

104. Professor Rhode points out a similar occurrence at class meetings where vocal participants skew group sentiment. Rhode, *supra* note 6, at 1237.

105. See Model Code of Professional Responsibility EC 7-7 (1983).

106. *Id.*

107. The ABA Model Code states in part:

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client, and if made within the framework of the law, such decisions are binding on the lawyer.

Id. at EC 7-8.

The Code also states:

> A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. . . . Advice of a lawyer to

sions regarding technical and legal tactical issues are the responsibility of the attorney.[108]

With respect to a class action case, where the client consists of class representatives as well as class members, the Model Code leaves open more questions than it answers. For example, who has the authority to make decisions that substantially affect the outcome of the case? Should this power be given to class representatives with the proviso that they have an obligation to ascertain the sentiments of class members?[109] Will class representatives truly express views of class members if the members' sentiments diverge from those of the representatives? What happens when there are disagreements among the class representatives? Given the peculiar nature of class action litigation, should class counsel be given greater decision making authority for the purpose of protecting the interests of the class as a whole? What happens when the attorney loses her objectivity and becomes aligned with a faction within the class?

The Rules for Professional Conduct provide that an attorney may not represent two or more clients where there is a potential for conflict.[110] When an attorney represents multiple clients in a single matter, the attorney must believe that the interests of each client are protected. Furthermore, each client must agree to the representation and the attorney must explain the strengths and weaknesses of common representation.[111] With regard to most civil rights class actions, these requirements are inapplicable. Instead, civil rights class actions are generally brought pursuant to FRCP 23(b)(2). Under that section of the Federal Rules, notice need not be given to class members before an action is filed or before class certification is sought. Moreover, class actions brought under FRCP 23(b)(2) do not generally per-

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his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative.

Id. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1994) (articulating the present rules in effect governing this principle).

108. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1994).

109. Professor Rhode indicates that once a class has been certified, class representatives are neither motivated nor in a position to monitor the congruence between class members and class counsel. Rhode, *supra* note 6, at 1183.

110. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1994).

111. The ABA Model Rules reads in part:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id. at 1.7(b).

mit members to opt out. Clearly, class members' ability to participate in decision-making is not advanced by FRCP 23(b)(2).

Despite the shortcomings of FRCP 23(b)(2), an attempt to address class conflict and the decision-making process is found at FRCP 23(c)(4) and (d), respectively. Namely, section (c)(4) permits the creation of subclasses while section (d) grants broad powers to the court for the purpose of protecting members of the class.[112] By providing for the creation of subclasses, FRCP 23(c)(4) recognizes that parties to an action may share an overall goal but all of their interests may not be aligned. The rule does not, however, offer any guidance to a class representative or counsel when the differences among subclasses become so great that the case can no longer proceed as one action. The rule further fails to require that each subclass have its own counsel.[113] Essentially, FRCP 23(c)(4) does little more than identify the problem; treatment is lacking.

Meanwhile, section (d) of FRCP 23 does provide a court with broad powers to ensure that class members are informed of and have input into their lawsuit.[114] However, judicial monitoring is not required throughout the course of litigation. Therefore, it becomes incumbent upon class counsel to keep the court apprised of problems as they arise. Due to time constraints and their own biases, class counsel may be disinclined to inform the court about conflicts among class members. Even if class counsel does apprise the court of divergent views within a class or among subclasses,

112. FRCP 23(d) provides:

> Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters.

FED. R. CIV. P. 23(d).

Rule 23(c)(4) states that "[w]hen appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." *Id.* at (c)(4).

113. Bisom-Rapp proposes that separate counsel be required where subclasses are formed because of an actual or potential conflict of interest. Where the interests of the subclasses are divergent, but do not necessarily conflict, separate counsel would not be necessary. Bisom-Rapp, *supra* note 95, at 116.

114. See *supra* note 61 for text of FRCP 23(a).

FRCP 23 does not provide the court with any principle upon which to determine who in a class action should have decision-making authority.

The court decisions concerning the problems of conflict in class actions generally address situations that have arisen during the remedy phase, when members within a class are dissatisfied with the terms of a settlement. If, during the course of litigation, class counsel, class representatives and class members have not shared in the decision-making process and have not developed a way for working out disagreements, a conflict over settlement can create an irreparable schism. In addition, the court may be reluctant to use its FRCP 23 powers at the final phase of litigation. Specifically, courts may be hesitant to set aside a settlement, appoint additional counsel or allow intervention if such action adds time and expense to already protracted litigation.

A case which demonstrates the problem well is *Pettway v. American Cast Iron Pipe*.[115] In *Pettway*, the court effectively illustrates the lack of established rules for allocating decision-making power among class representatives, class members and class counsel.[116] There, the crisis surfaced during the settlement phase when class counsel and a group of class members agreed to a decree which was neither supported by class representatives nor by a majority of class members.[117] The district court approved the settlement and the dissatisfied class members and class representatives appealed.[118]

The court of appeal in *Pettway* overturned the settlement.[119] In its opinion, the court, recognizing the lack of established principle in this area, stated that class counsel had a fiduciary duty to all class members and that the court, per FRCP 23(d), should have taken appropriate action to protect the interests of all class members.[120] The court did not explain why both safeguards, the powers afforded the court in FRCP 23(d) and the role of counsel as class fiduciary,[121] failed to protect class members when a conflict was presented.

115. 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

116. *See* Rhode, *supra* note 6, at 1193. Professor Rhode states that courts offer very little guidance or analysis for the problems presented in representing class members. She cites the *Pettway* decision as an illustration of a case which acknowledges that lack of established principles. *Id.*

117. 576 F.2d at 1166-67.

118. *Id.* at 1167. Professor Rhode points out that at settlement time when conflicts are most concrete, the pressures on the courts, counsel and parties to end the matter and overlook differences may be most intense. *See* Rhode, *supra* note 6, at 1227-28.

119. 576 F.2d at 1223.

120. *Id.* at 1169.

121. Earlier decisions recognized the need for class counsel to act as a fiduciary for those not before the court. *See, e.g.*, Greenfield v. Villager Indus., Inc., 483 F.2d 824, 831 (3d Cir. 1973).

2. Critics of the Game

Scholars who have looked at the problems created by conflicts within classes or among subclasses have come up with ideas for augmenting or changing the current Ethical Codes and Federal Rules of Civil Procedure. These ideas include differing visions for the roles of clients, counsel and the court in a class action.

Some authors recommend increased responsibility for class counsel in soliciting and gathering information from class members.[122] Specifically, the information gathered should address the question of class interest and probe members about the possibility of conflict. To avoid the ethical problem of client solicitation, one author proposes the creation of a new rule of professional conduct which requires class counsel to survey potential class members once certification has taken place. Ultimately, this survey would help counsel select appropriate class representatives, define subclasses when necessary and identify the need for additional counsel.[123]

Another suggested approach is a "client centered model." In such a model, the client receives sufficient information to make decisions about the direction of the litigation. To ensure informed decision-making, the class lawyer must conduct "face-to-face discussions with class clients and . . . class involvement should begin even before the action is filed."[124] Overall, the challenge is for class counsel to present information fully and impartially.[125] As one author suggests: "[L]ike an elected official, the class lawyer must reconcile the tension filled representative's impulse to act both as an instructed delegate and enlightened trustee."[126] This analogy to a public official recognizes the special group problem solving and conflict resolution skills which class counsel should possess.[127]

A third proposed approach to managing class conflict is the creation of a community interest. In such an approach, the community consists of the class as well as its counsel. Through regular communication and meetings,

122. *See* Grosberg, *supra* note 7; Note, *Conflicts in Class Actions and Protection of Absent Class Members*, 91 YALE L.J. 590 (1982).

123. *See Conflicts in Class Actions and Protection of Absent Class Members*, *supra* note 122. The author recommends that the information be kept by the court clerk and that the survey could also serve as a form of notice.

124. Grosberg, *supra* note 7, at 751.

125. *See id.* at 729. Professor Rhode points out that lawyers can comply with the obligation of notifying the class and do so in a manner which obfuscates the issues. Rhode, *supra* note 6, at 1236 (citing Mendoza *v.* United States, 623 F.2d 1338, 1350, 1352 (9th Cir. 1980), *cert. denied sub nom.* Sanchez v. Tucson Unified Sch. Dist., 450 U.S. 912 (1981)).

126. Grosberg, *supra* note 7, at 751.

127. *See Certifying Classes and Subclasses in Title VII Suits*, *supra* note 5.

lawyers and clients form a non-hierarchical community wherein the lawyers simply help facilitate the goals of the community.[128]

A fourth approach to conflict resolution involves a more active role for courts in monitoring class litigation. This idea manifests itself in different scenarios. One model would require class counsel to notify the court of all class contacts, including a description of any dissention within the class.[129] The court would then maintain a factual record of attorney-class contacts.[130] Similarly, other authors propose an activist court which ensures that class counsel and class representatives seek out dissent within the class and fully explore conflicts throughout the litigation. This proposal requires the court to explain all findings on class conflict.[131] A final proposal involving a more active court is the suggestion that class interest be reviewed at different stages of the litigation.[132] This proposal recognizes that class interest is not static and may change during the formation, liability or relief phase of litigation.

Aside from redefining parties' roles and encouraging a more active court, a final means of handling conflicts is more vigorous use of subclasses, with each subclass having its own counsel.[133] This suggestion also requires courts to monitor and revisit problem resolution throughout the litigation.

III. Hanging Together: Managing Class Conflict in the San Francisco Fire Department Desegregation Action

A. Certifying Subclasses in the *Davis* Case

Given the relevant class action case law, the decision to bring one action and the possibilities of conflict among the diverse class members, the plaintiffs in the *Davis* action, through their counsel, had to meticulously define class interest and fashion a motion for class certification.

The common factual and legal question uniting the *Davis* plaintiffs was the development and administration of allegedly biased and non-job-related entrance and promotion exams. All of the groups involved in the *Davis* action, black women applicants, white women applicants, black men applicants and black men promotional candidates suffered a similar type of

128. *See* Simon, *supra* note 6.
129. Rhode, *supra* note 6, at 1247-48.
130. *Id.*
131. *See* Bryant G. Garth, *Conflict and Dissent in Class Actions*, 77 NW. U. L. REV. 492 (1982); Mary K. Kane, Essay, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385 (1987).
132. Rhode, *supra* note 6, at 1247.
133. *See Certifying Classes and Subclasses in Title VII Suits*, *supra* note 5.

injury, the denial of positions because of exam scores. At the time the action was brought, the case law appeared to support one action where discriminatory selection devices are used to both hire and promote individuals.[134] However, the law was unclear whether one person could represent both job applicants and employers. As a result, in the *Davis* case, there were both employee and applicant representatives.

In addition to identifying commonality and class representatives, the plaintiffs had to decide whether to certify as one class or as subclasses. Because the discriminatory exams did not affect each group in the same way, counsel concluded that certification of one class was inappropriate. Clearly, there were divergent interests and a potential for conflict among the plaintiff groups and within each plaintiff subgroup.[135] For instance, consider the issue of biased tests. Specifically, when considering the distinct subgroups, white women only performed well on the written portion of the entry exam, black men excelled only on the physical agility portion of the entry exam and black women had difficulties with both parts of the entry exam. Meanwhile, the black men within the SFFD were challenging a different employment barrier: promotional tests. Even if a remedy were developed for the promotional exams, there was a finite number of promotional positions, thereby creating a potential for conflict within that specific subgroup. Other differences existed between the entry level screening devices and the promotional tests. The promotional and entrance exams had each been developed and administered by different consultants. Moreover, the promotional tests were designed to test different skills than the entrance test. Overall, the test issue itself suggested the inadequacy of certifying only one class.

Beyond the issue of testing, the subgroups had other distinct barriers inhibiting employment opportunities within the SFFD. Black men employed by the department had been racially harassed by co-workers and superiors during the previous five years, rendering the work environment hostile. Meanwhile, there were no women within the department; therefore, the need to address problems of separate bath and changing facilities, properly fitting equipment and uniforms, and the amending of rules and regulations to accommodate women never arose. Recognizing the differences among these groups and the potential for divergence or conflict during the litigation, the legal team sought certification of four subclasses: black men

134. *See* General Tel. Co. v. Falcon 457 U.S. 147, 159 n.15 (1982).

135. One of the co-counsel had expressed concern that the men would view the job as one requiring more physical strength than was actually needed, and that the white women would probably support an entrance exam that relied too heavily on written and verbal skills. Interview with William McNeill, *supra* note 51.

applicants, black women applicants, white women applicants and black men who were members of the Fire Department and had taken SFFD promotional exams. Although this structure did not resolve the problem of future conflicts, it did recognize that, despite a common goal of desegregating SFFD, differences did exist among the various groups of plaintiffs.

B. Developing a Model for Working Together

Throughout the SFFD litigation, plaintiffs' counsel remained dedicated to the ideal that the members of the class, together as one strong unit, would fight the battle against discrimination. The first step toward this collaborative effort was the development of a successful working relationship among counsel. With few examples to draw upon,[136] we developed, through trial and error, a successful way in which to work together. Regular co-counsel meetings were scheduled. Agendas were collectively developed for each meeting. Strategies were discussed and agreed upon using a consensus model, whenever possible. Work was divided up among the team in order to avoid duplicative efforts. Although collaboration was the goal, we recognized that some sort of hierarchy was needed. Thus, a managing attorney was selected to run the meetings, stay on top of the agenda and see to the completion of tasks. Later, as a trial date grew near, a lead trial attorney was added to our structure.[137] When tensions flared, an organizational consultant was retained to help us identify the source of our problems and develop a plan of action for overcoming them.

With a little less fervor, the class representatives supported this ideal of collaboration. Although FRCP 23 had no notice requirement,[138] the counsel team felt it was important to meet with and receive input from the class as a whole. Soon after the complaint was filed, a meeting of the class was held.[139] Approximately 50 clients attended the meeting; about 20 were black firefighters, another 15 were black male applicants, 10 were white women applicants and 5 were black women applicants. Although the law-

136. *See* Mary Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 72 MINN. L. REV. 697 (1988) (analyzing task-sharing among lawyer teams and concluding that lawyer teams sufficiently divide work and responsibilities).

137. *See* Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1175 (9th Cir. 1977) (discussing situation where district judge invited applications for lead counsel and then made the selection).

138. See *supra* note 62 for text of FRCP 23(b)(2).

139. Locating class members who were not members of the SFFD was a challenge. The City maintained the addresses of those persons who had taken and passed the entrance exam. We (the co-counsel team) needed the addresses for those persons who had taken and failed the entrance exam. The City did not keep those addresses. We came up with a list of class members by piecing together different bits of information: the records the City did retain; the list of participants in the BFA Pretraining Program; and, having class representatives attempt to contact potential class members.

yers led the discussion, the meeting was run in an informal manner. Everyone who wanted to participate had the opportunity. The meeting adjourned after about two and one half hours.

At this first meeting, it became clear that the vision of unity expressed by the initial class representatives was not necessarily shared by class members. Unlike the class representatives, who had been spurred into action by the injustices which befell them, class members had accepted their inability to obtain jobs or promotions within the SFFD and had resumed their lives. Indeed, the class representatives were not "typical" of the class members despite having suffered the same injury. Once informed that a lawsuit had been filed on their behalf, many of the class members wanted the suit to secure them positions as firefighters or officers. They were not particularly interested in the means to that end and felt it was of little import whether the litigation cured the cause of the discrimination. Instead, gaining a one-time exception rather than eliminating the biased exams would be considered a victory by many in the class. Unity or lack thereof among the class was also of little importance to them.

Although the legal team was disheartened that the views of the class representatives were not necessarily typical or representative of those of the class, the initial decision to bring one action challenging the cause of the discrimination was unaffected. Faced with the gulf between the representatives and the class members, the counsel team concluded that regular meetings with the class were necessary. We hoped that better communication among the parties would lead to an agreement on strategies for desegregating the SFFD. Additionally, because the sentiments of many of the class members differed from those of the representatives, the counsel team actively sought members' input before taking action. Significantly, we did not distance ourselves from the membership when confronted with the reality that the representatives were not typical of the class. Instead, using a model similar to that described by Professor Simon,[140] we chose to forge a closer relationship with the entire class. Our ultimate goal was to create a community of interest among all of the parties involved with the litigation. It was not clear, at that juncture, what the course of action would be once an irreconcilable difference surfaced.

1. A Clash Between Counsel and the Class

One of the first actual conflicts confronted by the counsel team was defining the subclasses. The conflict that arose was neither among class

140. Simon, *supra* note 6, at 500.

members nor between class representatives and class members. Rather, it was between counsel and the class.

The written portion of the 1982 SFFD entrance exam clearly had an adverse impact upon black men applicants. Nonetheless, some had passed[141] and gone on to perform quite well on the physical agility portion of the exam. In fact, the persons ranked numbers one and fifteen on the eligibility list were black men.[142] Because these men had not been injured by the allegedly discriminatory exam, class counsel believed that the black male applicant subclass should be defined and limited to those men who had taken and failed the written portion of the 1982 entrance exam. This definition avoided any conflict which could occur during the remedy stage of the litigation.[143]

The clients, particularly members of the Black Firefighters Association, argued that the underrepresentation of blacks within SFFD was due to racist attitudes long held by the Department leadership. To BFA members, the development and administration of biased employment exams was just one manifestation of that racism. They were not hung up on legal definitions of requiring the same type of injury. They therefore wanted a definition of the applicant subclass that erred on the side of overinclusion. Additionally, many of the black men who scored well on the 1982 exam had participated in the BFA pretraining program and identified with the mission and purpose of the Association. The BFA leadership wanted these individuals to stay connected to the struggle for integration which would undoubtedly be centered around the litigation.[144]

As a member of the co-counsel team, I remember clearly the steps we took to resolve this matter. After hearing the opinion of the BFA leadership, we felt feedback from those persons affected by the decision was important. That is, the black men who had taken the entrance exam. If they had agreed with our proposed definition of the subclass, we would have excluded persons who passed the test.

We called a client meeting. Members of the BFA and black male applicants were invited to the meeting. Women were not. We presented our

141. The 1982 SFFD entrance exam had 2 components: a written test and a physical agility test. The written test was graded pass/fail; no numerical score was given to the candidates. In order for a candidate to move on to the physical agility test, he or she had to pass the written portion of the exam. A candidate's score was based on his/her performance on the physical agility portion of the test.

142. *See* 1982 H-2 Eligibility List.

143. We were concerned that at the remedy stage the black men who had done well on the 1982 exam would object to a settlement which threw out the results of the old exam, developed a new non-discriminatory exam and hired candidates from that new exam.

144. Interview with Battalion Chief Robert Demmons, *supra* note 10.

opinion, including our view that a conflict between the two groups could occur during the final phase of the litigation. We were forthright in stating that should a conflict arise, we felt it was our obligation to protect the interests of those applicants who had failed the discriminatory exams. Now feeling a part of this "community" we were able to state that our first commitment was to those completely "frozen out" because of discriminatory tests.[145]

Bob Demmons then presented the BFA viewpoint. As was often the case, Demmons explained dramatically and eloquently the need for the struggle to encompass as many people as possible. A lively discussion ensued. One applicant expressed anger that the BFA should have any input given the fact that they already had jobs and would not truly be affected by any decision. Another applicant disagreed, arguing that great deference should be given to the opinions of BFA members since they had entered and survived a Department riddled with racism. Once the discussion finally focused on the merits of the decision at hand, it was clear that the majority of the applicants wanted a definition of the subclass to include all black men who had taken the entrance exam. The clients' sentiments were followed. As a result, the memorandum in support of plaintiffs' motion for certification of subclasses requested a subclass of "all black males who have taken or will take the San Francisco Civil Service entrance examinations required of all persons seeking employment as a firefighter with the San Francisco Fire Department."[146]

The resolution of this issue marked the beginning of a process for resolving conflict in the *Davis* litigation. Under the Model Rules of Professional Responsibility, one could argue that the definition of a subclass was a tactical issue for which the lawyers could assume responsibility.[147] However, class definition could also be characterized as an issue affecting the purpose and outcome of the litigation. Regardless of its characterization, the *Davis* legal team felt the need to consult their clients before making a

145. Interview with Eva Paterson, *supra* note 9; Interview with William McNeill, *supra* note 51.

146. *See* Memorandum of Points and Authorities In Support of Plaintiffs Motion for an Order Certifying Subclasses, Davis v. City and County of S.F., 656 F. Supp. 276 (N.D. Cal. 1987) (Nos. 84-1100 MHP and 84-7089 MHP).

147. The comments for Rule 1.2 read in part:

> Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation . . . . In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1994).

decision. Moreover, the attorneys sought input from two groups, the persons affected by the decision and those within the Department who possessed knowledge about the defendant. The opinion of those affected by the decision carried greater weight.

There was another component to the conflict resolution process, the role of the court. After meeting with the clients, the counsel team met separately to make a final decision. At the counsel meeting, Bill McNeill, who was to draft the motion, stated that he felt comfortable following the wishes of the clients.[148] According to McNeill, if their proposed subclass definition proved improper, the court would not certify it.[149] In essence, the counsel team recognized that under FRCP 23, courts could ensure appropriate decisions when a class was faced with a conflict.[150]

2. Intraclass Conflict

Perhaps the most serious pre-settlement schism to confront the *Davis* case occurred when the City retested women who had initially failed the physical agility test. As a result of the retest, the City offered to hire the 17 women who had either passed the original test or the retest, regardless of their score.[151] In effect, the City did not intend to revamp the SFFD physical agility test to ensure the hiring of additional women in the future. Furthermore, the City failed to propose any remedy to cure the underrepresentation of black men in both the entry and promotional ranks of the SFFD. The City was only willing to offer a quick fix for something that was becoming more and more of an embarrassment, San Francisco was one of the only major cities in the United States which did not have women fighting fires. The City's ability to divide the groups in this fashion had caused the counsel team concern when the complaint was initially drafted.

148. Interview with William McNeill, *supra* note 51.

149. *Id.*

150. The court ultimately certified the subclass of applicants per plaintiffs' request. The court's opinion addressed the problem of including both black men who had failed and black men who had passed the entry exam by stating:

> Those who passed high on the list may have their positions jeopardized if plaintiffs prevail and they have to take a different test. However, this will happen whether or not they are members of the class. If it is true the exam discriminates, there is a strong probability they will better their scores on a new, non-discriminatory exam.

Memorandum Decision and Order re Certification of Sub-classes and Motions for Summary Judgment, Davis v. City and County of S.F., 656 F. Supp. 276 (N.D. Cal. 1987) (Nos. 84-1100 MHP and 84-7089 MHP).

151. The highest scoring woman ranked number 1100 on a list of approximately 1300. Since the City only had 200-300 openings, without the City's offer, no woman would be hired. Additionally, unless the City devised a new physical agility test or again hired women out of rank order, it was unlikely that any additional women would ever be hired by the San Francisco Fire Department.

Equal Rights Advocates, the law firm which represented the women plaintiffs, was deluged with phone calls from the clients. The reaction was varied. Some of the women who were to benefit from the offer were delighted; others felt the City needed to do more. Women who had not passed either of the physical agility tests were disappointed and saw their chances of becoming firefighters diminishing. The leadership of the Black Firefighter's Association was infuriated. They believed that the City was using a divisive tactic to weaken the coalition of black men, black women and white women which had been forged by the lawsuit.

As the recipient of these phone calls, I remember feeling overwhelmed. While I believed that each caller's perspective had merit, I knew that a decision disregarding someone's viewpoint was unavoidable. I fielded the phone conversations by simply gathering everyone's opinion and deferring any decision making until a discussion was held at the next co-counsel meeting.

As I listened, it became clear that rejecting the City's offer affected the two subclasses of women differently. For the subclass of black women who had passed neither part of the entrance exam, refusing the offer had no immediate negative effect. In fact, to the extent that it served as a disincentive for the City to revamp its exams, accepting the offer harmed the subclass of black women.[152] This was not the case for the subclass of white women; some would benefit from the offer, others would not. Thus, the offer created a conflict within that subclass. Moreover, based on the information I had gathered from my phone calls, I realized that there was even conflict within the class of women who would benefit from this offer; some were delighted, others sensed ulterior motives by the City. As a member of this "community" fighting for desegregation of the SFFD, I felt the coalition splintering. I was disappointed, furious and determined to keep the "community" together. I was also a lawyer listening carefully to the various interests expressed by the parties affected and aware of my obligation to devise strategies that met those parties' needs.

At the next co-counsel meeting, the matter was discussed at length. Although the City's offer would bring women into the SFFD, the employment barriers facing the two subclasses of women would not be addressed. The physical agility test would still prevent white women from entering the SFFD and black women would continue to have difficulties with both the written and physical portions of the entrance exam. In short, neither of the women subclasses would truly benefit from the City's offer.

152. Two black women did stand to benefit from the City's offer. These women were very clear from the outset, however, that any offer which did not address the problems of racially discriminatory tests should be rejected. Interview with Kathryn Morrison, *supra* note 22.

Given the competing interests of the women, a decision was made that Equal Rights Advocates would not continue to represent both subclasses of women and that separate counsel would be retained for the subclass of white women who had passed the written portion of the test. The presence of a lawyer who represented solely the interests of white women did not diminish the conflict within that class, but it did remove the competing interests of black women. It also provided the subclass of white women with the ability to break away from the litigation should they decide on that course of action.

Once counsel for the white women was retained,[153] a meeting of the subclasses and their attorneys was held. The counsel team believed that the offer could effect the outcome of the litigation and therefore everyone's input was solicited.[154] We did recognize, however, that not everyone should be accorded the same weight in this decision.

The offer caused an explosion among the clients. Some of the women directly affected by the offer resented bitterly the presence of black men and women who had no direct stake in the matter. Other women felt the discussion should be limited to applicants and should not include members of the BFA since they already had jobs. Even with tempers flaring, a meaningful discussion did take place.

The lawyers explained the offer to the clients. The bias of the attorneys was clear; the offer did not go far enough because it did not remedy the cause of the underrepresentation of women, discriminatory tests. Mary Dunlap, the lawyer representing the white women, pointed out that there were some benefits to accepting the offer. The presence of women on the force would help dissipate the mythology that women could not fight fires. Overall, women's success on the job could help persuade the City to devise nondiscriminatory entrance exams.

Bob Demmons, President of the BFA, urged the women to reject the offer and tell the City that it needed to eliminate all of its discriminatory practices, not just those which caused it public embarrassment. He recounted the experience of black men hired in the early 1970s under a comparable program and stated that the City's failure to undertake a holistic approach to the problem had led to the present litigation.

153. The Law Office of Mary C. Dunlap was retained to represent the subclass of white women who had applied to be firefighters. She was asked by counsel to join the team, an action later approved by the class representatives.

154. We were worried about the success of our challenge of the entry exam once it had been used as the basis for hiring some members of our class. We also knew as a practical matter that not having women on the force was a problem for the political leaders of the City and gave us leverage in any settlement negotiations. We did not want to lose that power too early in the game.

Deborah Morrison, a black woman who stood to benefit from the offer, eloquently described the double burden of discrimination facing women of color. She did not want the City to remedy its sexist behavior without addressing its racist behavior. Ms. Morrison's plea moved two additional women who stood to be hired if the offer was accepted. Both of these women were white and had participated in the BFA's pretraining program. Meanwhile, a few of the women affected by the offer remained undecided. Others wanted to take advantage of the opportunity presented by the City's offer, but were willing to abide by the decision of the subclass. There was no consensus within the subclass. The meeting ended without resolution and with a feeling of frustration among its many participants.

Counsel met again. At this meeting, Mary Dunlap informed her co-counsel that she was prepared to recommend to her clients that they reject the City's offer. She explained that, as class counsel, she had a fiduciary responsibility to the entire subclass of white women who had applied to become firefighters.[155] Most of these women had failed the physical agility test and would not benefit at all from the hiring of 17 women. The subclass' interest in eliminating the biased employment barrier was not served by this offer. Ms. Dunlap decided to meet only with the members of the subclass she represented and present her recommendation.

The recommendation was followed. It was clearly a very bitter pill for some to swallow, but they took their medicine and continued to stay involved in the litigation. Although the conflict presented by the City's offer was ultimately resolved, the situation illustrated the competing interests that emerge during the course of employment discrimination class actions. Moreover, the lack of cogent procedure for handling such schisms was exposed.

Once faced with the conflict, the *Davis* counsel team sought input from class members. Maintaining close communication with the class in an attempt to reach consensus on litigation strategy had become the regular course of conduct for the *Davis* litigation team. It is significant, however, that the case law, the Federal Rules of Civil Procedure and the Model Rules of Professional Responsibility do not require input from the class as a whole during litigation, even when a conflict arises. Additionally, the *Davis* counsel attempted to present the conflict in a clear manner and express their views honestly and openly, even though there was no express procedure to gauge whether that in fact had occurred.

155. Ms. Dunlap was following the rule expressed in Pettway v. American Cast Iron Pipe, 576 F.2d 1157, *cert. denied*, 439 U.S. 1115 (1979).

The conflict presented by the City's offer also prompted the *Davis* counsel team to add another lawyer to its ranks. FRCP 23(d) grants the court the power to appoint additional counsel when there is a conflict,[156] however, the rule lacks a mechanism for ensuring that the appointment occurs. In the *Davis* case, the court was never informed of the conflict which arose when the City offered to hire 17 women. Therefore, the court never had the opportunity to decide if additional counsel was necessary. Although the *Davis* legal team believed that an additional attorney was required to help resolve the conflict, no judicial determination was made regarding the appropriateness of that decision.

Finally, in the conflict presented above, the *Davis* legal team was unable to achieve a clear consensus from those most affected by the offer. The counsel team did rely on the case law which holds that class counsel should act as a fiduciary for those persons not before the court and made a decision accordingly. Again, a procedure is needed to ensure that when class counsel is called upon to act as a fiduciary, the best interests of the class are observed.

Conclusion

The early stages of the *Davis* case support the conclusion that broad employment discrimination class actions can be brought without sacrificing the interests of class members. Moreover, the actions can serve as a way to bring women and people of color together to create institutional change. In the *Davis* case, goals were achieved through teamwork, clients and counsel trying to create a "community of interest." It was our hope that creating a community would allow for frank and open discussions about the case, including the ability to confront our differences and to reach resolutions which benefitted each segment of the community and the community as a whole.

The case, however, illustrates the absence of clear rules and procedures for handling conflicts and divergences that occur among class counsel, class members and class representatives. Although the *Davis* counsel team developed its own procedures for addressing schisms, it often came about in a haphazard, "seat of the pants" manner. Guidelines for resolving class conflicts would have been of great assistance to the *Davis* legal team.

By drawing upon the lessons learned during the *Davis* litigation and the recommendations of others who have examined this area, I now offer

156. *See supra* note 112 for text of FRCP 23(d).

suggestions which can ensure better representation of class interests, help to resolve conflicts and facilitate the creation of a community of interest.[157]

A. Amending the Rules of Professional Responsibility

The rules governing professional responsibility must be amended to address the attorney-client relationship in class actions. The first task is to establish a rule encouraging regular and complete communication among class counsel, class representatives and class members. The model put forth by Professor Simon, whereby class counsel, class representatives and class members create a "community of interest,"[158] presents a good starting point for a Model Rule. In order to develop such a community, more regular and open exchanges of information are necessary. Certainly, the form and regularity of the communication would be dependent upon the circumstances of each case.[159]

Additionally, the Model Rules must delineate who, as among class counsel, class representatives and class members, has decision-making authority in a class action. The current rules grant power to the client in the traditional attorney-client relationship.[160] In a class action context, that model is unworkable because divergent or conflicting interests may develop among class members or between class members and class representatives. The rule must recognize that class action lawyers have a special or fiduciary duty to ensure that decisions are made in the best interests of the membership as a whole, not solely in the best interests of the class representatives.

B. More Strict Monitoring of Class Certification

At the outset of the case, when little is known about the theory of the case and it often appears as a straightforward violation, class certification takes place. Later, as the facts unfold and new or different legal theories emerge, courts seldom revisit the certification of the class to examine if potential or actual conflicts have arisen or if the class needs to be redefined. Often, a court does not reconsider the definition of the class until the rem-

157. These suggestions are geared toward civil rights cases where structural changes are being made within an institution.

158. Simon, *supra* note 6.

159. Small class actions may provide the opportunity for regular meetings of the entire class. This may not be possible in large cases; subclasses may be able to meet. Written communication and polling may be necessary to supplement meetings.

160. *See* MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.2 (1994); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7, 7-8 (1983).

edy phase. Generally, at this late stage, a court is unlikely to risk meddling with the class because it might jeopardize resolution of the case.[161]

FRCP 23, however, allows the court to modify the class consistent with developments in the case.[162] Courts should be required to monitor the appropriateness of a class certification order throughout the litigation to see if modifications are in order. If such a requirement is too burdensome for the courts, magistrates or special masters can be assigned to monitor and evaluate the interests of the class members throughout the litigation.[163] At all times, members of the class must be informed of persons responsible for the monitoring so that problems or conflicts can be communicated effectively and in a timely manner.

C. A Membership Outreach Plan Should Be a Requirement of Class Certification

Because class representatives may not express the interests of the membership, lawyers should be encouraged to communicate and seek input from those affected by the litigation. The class certification motion is the ideal time to present a plan to the court indicating how class counsel plans to notify and communicate with the members of the class. Notices, surveys, town meetings, and the like are effective means of communication, depending on the size of the class and the nature of the problem addressed by the lawsuit. The plan should have a tentative timetable and should be approved by the court.

The certification motion should also identify any potential conflicts known to the class counsel and present a plan to address the conflict. With this information, the court should directly, or through a magistrate or special master, periodically monitor whether counsel is truly meeting the obligation to communicate with the members of the class. Additionally, throughout the litigation, the court must continue to inquire into any conflicts and ensure that all class members' interests are being addressed.

161. *See, e.g.*, Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980), *cert. denied sub nom.* Sanchez v. Tucson Unified Sch. Dist., 450 U.S. 912 (1981).

162. General Tel. Co. v. Falcon, 457 U.S. 147, 159 (1982).

163. The Northern District of California has a successful Alternate Dispute Resolution model for early evaluation of cases. *See* NINTH CIRCUIT, GENERAL ORDER NO. 26, EARLY NEUTRAL EVALUATION (1993). This model could be adapted for class action purposes.